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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 482

FOX RIVER PAPER COMPANY
PATTEN PAPER COMPANY, Limited
APPLETON WOOLEN MILLS et al
Plaintiffs in Error

vs.

RAILROAD COMMISSION OF WISCONSIN
Defendant In Error

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

JOHN W. REYNOLDS,
Attorney General

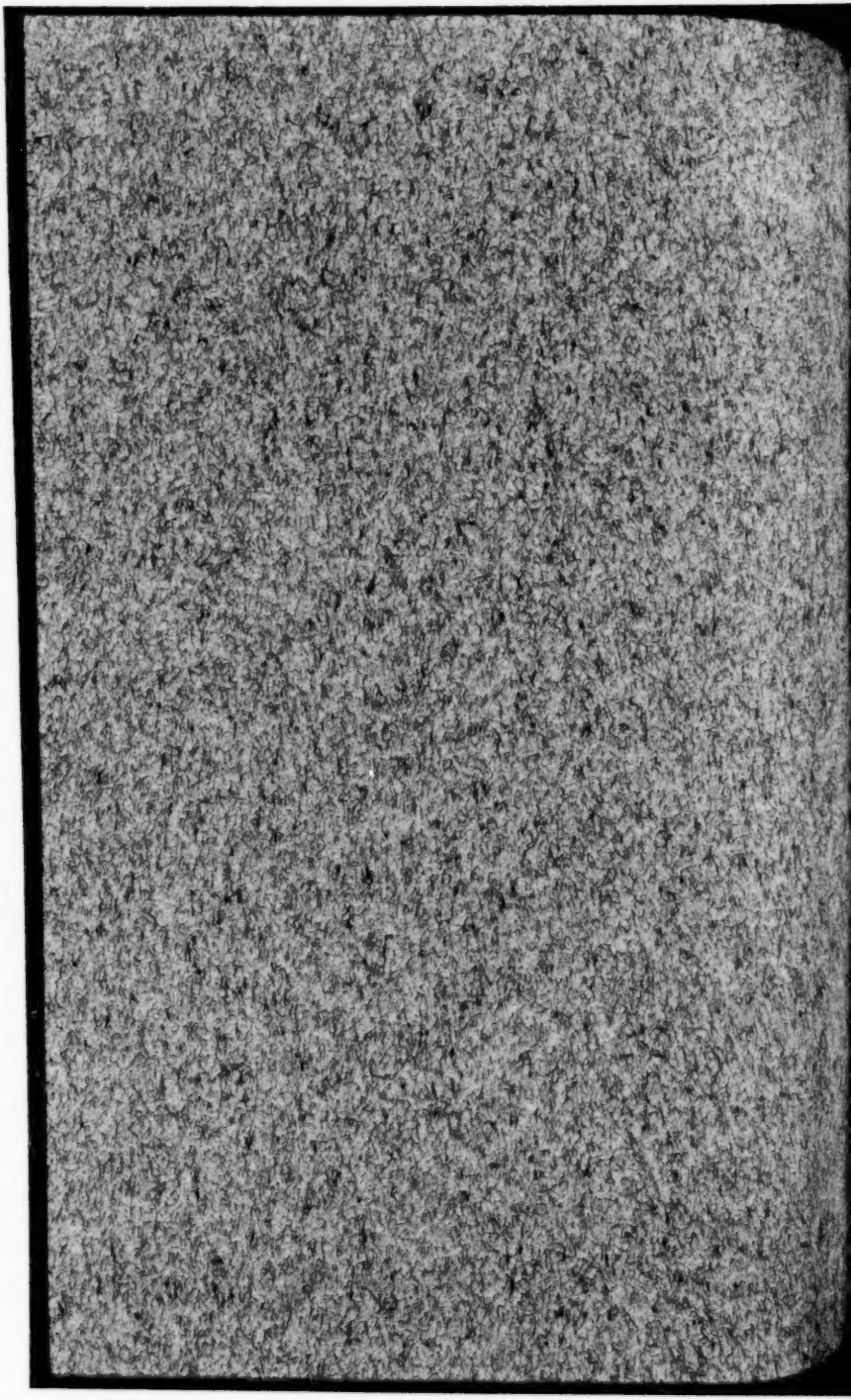
T. L. MELVOIN,
Assistant Attorney General

MICHAEL J. DUNN, JR.,
Assistant Attorney General

R. M. EVANS,
of Counsel

ADOLPH KANTHACK,
Member of the Railroad Commission of Wisconsin,
Attorneys for Defendant in Error

BYRON S. ADAMS PRINTING, WASHINGTON, D. C.



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Plaintiffs in Error

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RAILROAD COMMISSION OF WISCONSIN
Defendant In Error

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

In view of several propositions stated in plaintiffs' reply brief, and in order to supply the Court with the citations upon which part of the oral argument will be based, the defendant in error has concluded to submit this additional memorandum.

THE STATE IS WITHOUT POWER TO GRANT ANY PRIVATE PROPERTY RIGHT IN THE UNDEVELOPED POWER, BECAUSE BY DOING SO IT WOULD RELINQUISH A TRUST IT OWES TO THE POEPLE AT LARGE AND WOULD BE VIOLATING AN OBLIGATION IT OWES TO THE UNITED STATES GOVERNMENT.

The foregoing proposition has its foundation in the Ordinance of 1787, Art. IV, which provides that

"The navigable waters leading into the Mississippi and St. Lawrence Rivers and the carrying places between the same shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States."

The Fox River wherein this dam is situated is one of the "navigable waters leading into the St. Lawrence."

The obligation thus created was restated in the Wisconsin Territorial Act (5 Stat. at Large, 15, Sec. 12) and in the Wisconsin Enabling Act (9 Stat. at Large 57, Sec. 3). The National Government as early as 1846 granted uplands in Wisconsin to a corporation for the improvement of this "common highway" (9 Stat. at Large 83).

The duty to keep these "common highways forever free" was the trust which the State of Wisconsin assumed and which it could not relinquish. Re: Long Sault Development Company (242 U. S. 272, 279); Horicon Drainage District (136 Wis. 227, 237).

If the claims of the plaintiff in error are true, however, the State has divested itself of all power over the construction of dams except the police power. It cannot then refuse to grant a license to erect or maintain a dam when in its judgment such dam may interfere with navigation in the future. It can only say to the riparian owner—you cannot build a dam unless it is safe and can prescribe specifications for making it safe. If that is true, what has become of the trust which the State has assumed? If the right claimed exists, the owner of the site must have an absolute right to keep his dam in the waters and can prevent the State from requiring its abatement when the needs of navigation require; otherwise, where is the ripa-

rian's property right of which he is to be deprived? If he has not the right to prevent the State from abating the dam, the State in reclaiming the developed water power is not depriving him of anything. Suppose the plaintiffs are right and the Federal Government should say—this highway which is always to remain open for the benefit of the people at large must be improved in such a way as to eliminate this dam and that this action is taken within a year after the Wisconsin permit demanded by the plaintiff in error is granted, where is the property right alleged to have been acquired from the State? On the other hand, if the State has the power for a temporary reasonable period to give the plaintiff a right to use this development and this right will be recognized by the Federal Government as is indicated in plaintiff's brief on page 28 by the federal statute quoted, the State then surrenders a thing of value by assuring to the owner of the dam site the use of the power for a definite period and creates an additional value by agreeing to pay such owner for the development at the end of the period, instead of requiring him to abate the dam at that time. By doing so, instead of taking his property, the State is giving him something to which he is not of right entitled and in return therefor exacts an agreement from him to sell that particular part of the development which he contributed on a basis that is fair and equitable and at terms that are fixed at the time the permit is negotiated.

THE STATE HAS CARRIED OUT ITS TRUST OBLIGATION AND HAS NEVER SURRENDERED TO THE RIPARIAN ANY RIGHT TO THE UNDEVELOPED WATER POWER.

As early as 1840 by Act 9 of the Wisconsin Territorial Laws it was provided that

> "All rivers and streams of water in this territory in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States Government are hereby declared navigable to such an extent that no dam, bridge or other obstruction may be made in or over the same without the permission of the Legislature."

This statute was reenacted in 1849 and has continued in force ever since. By this act the power to erect dams was absolutely subject to the will of the Legislature. Again, in 1853, the provisions of Article IV of the Northwest Ordinance were declared as the policy of the State (Chap. 34, Laws of 1853, Sec. 1).

During the period from 1836 to 1909, 665 Special Acts of the Wisconsin Legislature authorized the construction of dams. Of this number 327 contained a reserve clause authorizing the Legislature to amend, alter or repeal the charter; 244 contained specific regulations for the improvement of navigation; 227 were for hydraulic purposes; 52 were for hydraulic and navigation purposes; 79 to facilitate log driving and navigation; 63 had varied provisions such as dams to feed canals, to create ponds and cranberry marshes; including 44 grants where no purpose is mentioned. (See Report of Committee on Water Power, Forestry and Drainage, Wis. Legis. 1910, Pt. 1, pp. 124 to 249, especially pp. 246 to 248.) Thus it would appear that not only did the State require permits before dams could be legally erected, but the owners of sites universally recognized that they had no right to construct a dam until such permission was given.

Originally a large part of these grants were in aid of lumbering, but by 1910 conditions had so changed that a distinct demand existed for a definite policy

with respect to future water power development and as a result of the comprehensive investigation above referred to, Chapter 652, Laws of 1911, was passed. The purpose of this law was to induce development of water power sites by giving a right to maintain the dam for a fixed period of time and also fixing the rights of the owner of the dam at the expiration of the permit. By doing so the public interests were protected without damage or injury to the private interests. This statute was declared unconstitutional primarily because it endeavored to make illegal dams which had been previously erected under legislative permission and permitted the appropriation of such dams by private persons for private uses, as is explained in the main brief.

Nor was this agitation for a fixed and definite policy of granting and regulating permits for such developments peculiar to Wisconsin. The United States Government, through its Water Power Commission, conducted a similar investigation beginning in 1909 and ending in 1912 and as a result of this investigation it reported that:

> "Nothing is more discouraging to the investment of capital than uncertainty. A grantee of the Government under this condition of grant (for a fixed period of time) might hope, if he endeavored to render the best service possible under the circumstances, that Congress at the end of the grant would be inclined to treat him fairly or even generously and that he would not be deprived of his property without compensation; but considering that it is a hope which involves the uncertainty of future policy, it is one not easy to capitalize. The only safe supposition is that the plant will be forfeited to the Government at the end of the period and on this basis the enterprise

must be financed. This means that provision for amortization of the plant must be made by the end of the fifty years. The business must earn during this time enough to pay all operating expenses, the annual interest on the investment, charges resulting from depreciation and obsolescence and in addition enough to repay the entire cost of the original plant, together with all improvements and additions, otherwise the entire enterprise is foredoomed to financial disaster. No company would accept a grant on such terms unless they were allowed to make such charges for the service or output as would enable them to meet all these financial obligations. When prevented by the regulations of some state commission or by competition with other forms of power from collecting such charges, no development will take place."—*United States National Water Power Commission.*—Final Report, p. 54.

Here again appears the public concern in extending the greatest inducement to water power development consistent with the imperative necessity for protection of the right of navigation, and the same committee concluded that:

> "The provisions for ousting a guarantee at any time on payment for the property is apparently intended to protect the Government against the emergency which would require the removal of a dam or other works because of an unforeseen contingency of navigation." (54).

This kind of legislation by the Federal Government was made necessary, moreover, by the refusal of the Presidents of the United States to approve special acts authorizing water power development unless they contained comprehensive plans for protection of the Government and for compensation to the Government

for the rights thus extended to the riparian owners. Congressional Rec., Vol. 48, p. 10318, Dixie Power Co., White River, Cotter (H. R. Doc. 899); Congressional Rec., Vol. 48, p. 11796, Coosa River Dam, Ala. (Sen. Doc. 949).

Following the decision the so-called water power cases, 148 Wis. 124, the Legislature in 1915 passed the present statute and eliminated therefrom the objectionable features referred to by the Court in these cases. It will be observed that the method prescribed by the statute furnishes to the water power owner definite assurance that he may have the use of the power for the period of 30 years, and that if the State desires at the end of that period to use the power and to develop the navigation, it must compensate him for the value of the improvements. If it does not desire to do so at that time, he may continue to use the development until such time as it will need the development. This policy insures to the water power owner compensation for his development which the State could seize upon for navigation purposes and require him to destroy if the permit were to run for but 30 years without such provision. Thus viewed, the statute does not deprive him of anything, but it insures him the compensation which the State is offering to pay voluntarily.

Rundle v. Delaware & Raritan Canal Co., 14 How. 80, 91, 92, 93, 94.

Estoppel.

It is urged by the plaintiffs in error that the Wisconsin Water Power Law is valid in all its provisions except as to Paragraph 3 of Section 31.09; that this paragraph alone is unconstitutional and void, and that

it is a separable or independent provision, so that the act as a whole must stand even if this paragraph falls; that inasmuch as the plaintiffs in error have offered to comply with the valid provisions of the act, that therefore they are not estopped from asserting the unconstitutionality of such parts of the act as are severable.

The provisions of the Wisconsin act are not separable but must be considered together. It is a well recognized principle that where various parts of an act are so related that the act forms an organic whole, portions of it will not be sustained unless it appears that the Legislature would have enacted them independently of the other portions of the act.

Huber v. *Martin*, 127 Wis. 412.
Bonnett v. *Vallier*, 136 Wis. 193, 196.
State v. *Hinkel*, 144 Wis. 444.

In *State* v. *Hinkel*, the court says (p. 450):

> "The various parts of this act are not severable into separate and complete regulations of any branch of the subject it embraces and hence cannot be upheld in part and rejected in part. Furthermore, it is obvious from the context of the act that the void parts of the act embrace the dominant purposes of the legislation and were the inducements to the enactment of the other portions. Under these circumstances the whole of the act must fall with the invalid portions."

It is obvious that the Legislature would not have enacted the law without the recapture provision. The Legislature was careful to limit the franchise of an applicant for permission to construct and maintain a dam under Section 31.05 or an application to legalize

a dam existing without legislative authority under Section 31.07 to a period of 30 years or for so much longer thereafter as the Legislature in its discretion may determine.

If the provision of recapture is held to be unconstitutional and the rest of the act stands, the franchise would be perpetual. The act confers broad powers on the Railroad Commission to protect public rights in the navigable waters of the State, even to the extent of regulating and controlling the level and flow of waters and the fixing of the maximum and minimum level for waters to be impounded in any dam. What the requirements of the public, with respect to its navigable waters, may be, after the lapse of 30 years, no one can tell. It is the policy of the State to fix a definite term for which a dam may be maintained instead of making the franchise terminable, as was the policy of the Federal Government prior to the Federal Power Act of 1920.

Moreover, the Railroad Commission is a fact-finding body. In order to confer jurisdiction under Section 31.05 or 31.07, two essential requirements must be complied with; namely, the applicant must file a written application with the Commission setting forth certain facts, and secondly, he must file with the Commission the proposal under Section 31.09. A failure in either requirement leaves the Commission without jurisdiction to act.

The plaintiffs in error on pages 16 to 19 of their reply brief cite state legislation pertaining to the sale of state lands and pertaining to the assessment of lands for taxation purposes. They say it appears that the legislature recognized the fact that water power adds value to the lands. With respect to non-navigable streams, the power capacity of the stream is a riparian

right and may be valuable. There are other rights pertaining to the upland which have value and should be taxed such as accessibility to the water, and to use the streams for various purposes not inconsistent with public rights.

The case of *Green Bay & Mississippi Canal Company* v. *The Kaukana Water Power Company*, 70 Wis. 635 (1888), is again referred to in the reply brief of the plaintiff in error on page 13 as supporting the proposition that the water power company is as against the state the owner of the water power.

If this be true, which we do not admit, then it is inconsistent with the decision in later cases, namely, *The Falls Mfg. Co.* v. *Oconto Co.*, 87 Wis. 134, 150, 151 (1894), where plaintiff's water power was greatly impaired without compensation because the State had improved the stream for navigation and in which case are cited with approval: *Cohn* v. *Wausau Boom Co.*, 47 Wis. 314 (1879); *Black River Improvement Co.* v. *La Cross, etc.*, 54 Wis. 659, 681, 682 (1882), discussed in brief for the defendant in error on pages 20, 21, and 22.

With respect to Chapter 374 (207-M), Laws of 1909, which provides that "in the sale of state lands the conveyance thereof shall be subject to the continued ownership of the state of all water power rights on such lands," we need only point out that by retaining the upland necessary for the dam site and flowage, the State having the right at any time to erect the dam or authorize a municipality or other person to do so, possesses a potential water power of value.

The Janesville Cases

Plaintiff cites *Janesville* v. *Carpenter*, 77 Wis. 288 (1887) in support of their contention that the State may not refuse permission to a riparian owner to erect a dam over a navigable stream. In *State* v. *Carpenter*, 68 Wis. 165 (1887) [These cases involve the right to drive piles in the bed of the Rock River at Janesville to support a building.] the Court held that the location of the Carpenter lot is between two bridges on piles without draws within 40 rods of each other; that dams and bridges span said river in the City of Janesville in many places which prevent the use of the river for navigation; that many buildings have been built into said river from abutting lots, and that such obstructions have existed for many years and that the building of the defendant would not materially obstruct such navigation as still exists.

The Court held that when anyone in good faith shall have the means of using said river for the legitimate purposes of navigation and shall desire so to use it for such purposes, it will be deemed time enough for him or the Attorney General to complain, and the courts of law will afford in such a contingency an ample remedy.

In *Janesville* v. *Carpenter* the city relied upon Chapter 423 of the Laws of 1886, which purport to give a cause of action for putting obstructions in the Rock River and "that any such obstructions might be enjoined at the suit of any resident taxpayer without proof that any injury or danger has been or will be caused by reason of the act." The Court held the act void for a number of reasons, particularly in this that the statute permitted a private individual to bring an

action to enjoin the riparian proprietor of the use of the bed of the stream, irrespective of whether any public or private rights had been invaded.

Respectfully submitted,

JOHN W. REYNOLDS,
Attorney General
T. L. MCINTOSH,
Assistant Attorney General
MICHAEL J. DUNN, JR.,
Assistant Attorney General
R. M. RIESER,
of Counsel
ADOLPH KANNEBERG,
Member of the Railroad Commission of Wisconsin,
Attorneys for Defendant in Error